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AVON PRODUCTS, INC.			GHALI, ISIS A D	
AVON PLACE			ART UNIT	PAPER NUMBER
SUFFERN, NY 10901			1611	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/748,737	<b>Applicant(s)</b> ROBINSON ET AL.	
	<b>Examiner</b> Isis A. Ghali	<b>Art Unit</b> 1611	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 09 September 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-12, 15, 16, 19-24 and 29-32 is/are pending in the application.
- 4a) Of the above claim(s) 1-12 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15, 16, 19-24, 29-32 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

Receipt is acknowledged of applicants' amendment filed 09/09/2009.

Claims 13, 14, 17, 18, 25-28 have been canceled, and claims 29-32 have been added.

Claims 1-12 and 15, 16, 19-24, 29-32 are pending.

Claims 1-12 have been previously withdrawn without traverse from consideration in the reply filed on 03/12/22007.

Claims 15, 16, 19-24, 29-32 are included in the prosecution.

**The following rejection has been overcome by virtue of applicants' amendment and remarks:**

The rejection of claim 19 under 35 U.S.C. 112, first paragraph as failing to comply with the written description requirement.

**The following rejections have been discussed in details in the previous office action, and are maintained for reasons of records:**

***Claim Rejections - 35 USC § 103***

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1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 15, 16, 19-24, 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robinson et al. (US 2003/0049212) in view of Puchalaski, Jr. et al. (US 4,690,818).

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Robinson teaches skin composition comprising 0.1-30% silicone elastomer, 0.5-10% emulsifier, surfactant, and 1-95% water (abstract; paragraphs: 0075, 0133, 0137; claims 1, 12, 14). The composition useful for cleansing can be formulated as rinse off cleansing such as shampoos, or can be hair conditioners (paragraph 0213).

Advantageously, the silicone elastomer is dimethicone/vinyl dimethicone crosspolymers (paragraph 0089; claim 11). The emulsifier preferably has HLB value of 2 to 14 (paragraph 0159). The emulsifier can be polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids and sucrose fatty acid esters (paragraphs 0168, 0192). The surfactant is cationic, anionic, zwitterionic or amphoteric surfactant, and present in amount of 5-10% (paragraphs 0169, 0193, 0212).

Although Robinson teaches polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids, however, the reference does not explicitly teach PEG-7-glyceryl cocoate as instantly claimed by claim 24 and 29.

Puchalaski teaches cleansing composition that can be in the form of shampoo comprising PEG-7-cocoate in to promote good feel and adjust viscosity of the composition (abstract; col.2, lines 56-63; examples 1 and 2).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide shampoo comprising dimethicone/vinyl dimethicone crosspolymers, emulsifier including polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids, surfactant and water as taught by Robinson, and utilize the fatty acid ester PEG-7-cocoate taught by Puchalaski. One would have been motivated to do so because Puchalaski teaches that PEG-7-cocoate promotes good feel and adjusts viscosity of

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shampoo composition. One would reasonably expected formulating cleansing shampoo composition comprising dimethicone/vinyl dimethicone crosspolymers, PEG-7-cocotate, surfactant and water wherein the composition has good feel and acceptable viscosity.

### ***Response to Arguments***

5. Applicant's arguments filed 09/09/2009 have been fully considered but they are not persuasive.

Applicants argue that the claimed invention relates to a method of treating hair to deter the buildup of sebum on the surface of the hair by using a rinse out aqueous hair care composition containing unique blends of water dispersible or water soluble esters and surfactants that produce unexpected results.

In response to this argument, it is argued that all the elements of the claimed method is taught by the prior art in combination. The claimed method is achieved by applying a rise-out hair composition, and Robinson in combination with any of the secondary references teach rise out composition comprising the same elements as instantly claimed. The results provided by applicants are conditioning effects. Applicants admit in page 6 of their response, third paragraph, that: "The unexpected results of significantly improved conditioning performance are directly related to the reduction of sebum on the surface of the hair." Therefore, Robinson when teaches conditioning effect obtained from the composition comprising the same elements as instantly claimed, then it is due to reduction of sebum effect. If the prior art meets the structure recited, the properties must be met or Applicant's claim is incomplete. This is in line with

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*In re Spada*, 15 USPQ 2d 1655 (1990) which holds that products of identical chemical composition can not have mutually exclusive properties.

In addition, regarding applicant's arguments of unexpected superior results in the instant specification, it is the examiner's position that the data in the specification regarding conditioning effects are not unexpected results and therefore can not rebut prima facie obviousness. The examiner directs applicant's attention to MPEP 716.02 (a). "A greater than expected result is an evidentiary factor pertinent to the legal conclusion of obviousness of the claims at issue." *In re Corkhill*, 711 F.2d 1496, 266 USPQ 1006 (Fed.Cir. 1985). *In Corkhill*, the claimed combination showed an additive result when a diminished result would have been expected. Furthermore, the MPEP states, "Expected beneficial results are evidence of obviousness of a claimed invention, just as unexpected results are evidence of unobviousness thereof." *In re Gershon*, 372 F.2d 535, 538, 152 USPQ 602, 604 (CCPA 1967).

Furthermore, applicants failed to show unexpected results of deterring the buildup sebum on the surface of the hair.

Applicants argue that Robinson relates to a skin care composition containing niacinamide and tacky solvent to solubilize it. Robinson invention relates to issues, concerns, and applications that are totally unrelated to applicants' claimed method. Applicants argue that Robinson's skin care products include moisturizers, personal cleansing products, occlusive drug delivery patches, skin treatment emulsions, hair conditioners and the like. However, all compositions in Robinson are formulated with the

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objective of delivering of a cosmetic active to alleviate the signs of skin aging, and not to a method for deterring the buildup of sebum on the surface of the scalp hair.

In response to this argument, applicants' attention is directed to paragraph 0213 of Robinson where the reference teaches composition useful for cleansing that can be formulated as rinse off cleansing such as shampoos, or can be hair conditioners. Further, Robinson teaches composition comprising 0.1-30% silicone elastomer, 0.5-10% emulsifier, surfactant, and 1-95% water. Advantageously, the silicone elastomer is dimethicone/vinyl dimethicone crosspolymers. The emulsifier preferably has HLB value of 2 to 14. The emulsifier can be polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids and sucrose fatty acid esters. The surfactant is cationic, anionic, zwitterionic or amphoteric surfactant, and present in amount of 5-10%. Therefore, Robinson clearly teaches the present rinse off composition comprising the claimed components in the claimed concentrations that has hair conditioning effects, which implies sebum deterring effect from the surface of the hair, as applicants admit. **In order to reach the final effect, which is conditioning, the intermediate effect of deterring sebum buildup on the surface of the hair should be achieved.** In considering the disclosure of the reference, it is proper to take into account not only the specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom. *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968). The rational to modify or to combine the prior art does not have to be expressly stated in the prior art; the rational may be expressly or impliedly contained in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art. The reason or

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motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve different problem. It is not necessary that the prior art suggest the combination or modification to achieve the same advantage or result discovered by applicant. *In re Linter*, 458 F.2d 1013, 173 USPQ 560 (CCPA 1972).

Applicants argue that the Examiner's effort to correlate the teachings of Robinson to make applicants' claimed invention obvious to those skilled in the art is an unreasonable distortion of Robinson. Without having the benefit of applicants' claimed invention there would not appear to be any incentive or basis to extrapolate the teachings of Robinson to relate to a method for treating hair to deter the buildup of sebum on the surface of the hair.

In response to this argument, it is hereby repeated that the elements and their concentrations of the present composition are taught by Robinson for the claimed benefit, which is rinse off shampoo for hair conditioning effect. Applicants admit in page 6 of their response, third paragraph, that: "The unexpected results of significantly improved conditioning performance are directly related to the reduction of sebum on the surface of the hair." This relation of conditioning agent and sebum formation is fact known in the art as evident by the disclosure of Herstein et al. (US 4,534,964) that teaches that conditioning shampoo compositions improved reduction in sebum spreading on the hair (col.2, lines 5-11, col.6, lines 10-14). Therefore, Robinson when teaches conditioning effect obtained from the composition comprising the same elements as instantly claimed, then it is due to reduction of sebum on the hair. If the

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prior art meets the structure recited, the properties must be met or Applicant's claim is incomplete. This is in line with *In re Spada*, 15 USPQ 2d 1655 (1990) which holds that products of identical chemical composition can not have mutually exclusive properties.

In response to applicant's argument that without having the benefit of applicants' claimed invention there would not appear to be any incentive to extrapolate the teachings of Robinson to relate to the instant method, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In the instant case Robinson suggested the claimed composition for shampoo and conditioning effect.

Applicants argue that the Examiner admits that Robinson does not explicitly teach PEG-7-glycerol cocoate as claimed in claims 24 and 29.

In response to this argument, it is argued that this lacking element from the teaching of Robinson is taught by Puchalski.

Applicants argue that Puchalski discloses a shampoo or bath shower gel that remains on the skin and hair for extended periods of time. There is no disclosure or

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suggestion in Puchalaski of a method for treating the hair to deter buildup of sebum on the surface of the hair.

In response to this argument, it is argued that conditioning composition will achieve this effect by deterring the sebum from the surface of the skin. Both of Robinson and Puchalaski teach conditioning effects. Further the combination of the references teaches every elements of the conditioning composition in the same concentration as instantly claimed. Therefore, conditioning effect due to deterring of the sebum from the surface of the hair is achieved since compounds and their properties are inseparable. The discovery of a new action underlying a known process does not make it patentable. *MEHL/Biophile*, 192 F.3d at 1365, 52 U.S.P.Q.2d at 1303. Also, it is irrelevant that the prior art observers did not recognize the property or function of the disputed claim. If the prior art meets the structure recited, the properties must be met or Applicant's claim is incomplete. This is in line with *In re Spada*, 15 USPQ 2d 1655 (1990) which holds that products of identical chemical composition can not have mutually exclusive properties.

Applicants argue that Puchalaski's composition requires a combination of cocodimonium hydrolyzed keratin and a mixture of monosaccharides and disaccharides in combination with amino acids. Puchalaski emphasizes that the combination of components is unique, which would indicate to one of ordinary skill in the art that the indiscrimination substitution of other component would not provide Puchalaski's objective of "unexpectedly good substantivity".

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In response to this argument, it is argued that Puchalaski is relied upon for the solely teaching of PEG-7-cocoate to promote good feel and adjust viscosity of the composition. This teaching would have motivated one having ordinary skill in the art at the time of the invention to utilize the fatty acid ester PEG-7-cocoate instead of polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids taught by Robinson. One would reasonably expected formulating cleansing shampoo or conditioning composition comprising dimethicone/vinyl dimethicone crosspolymers, PEG-7-cocoate, surfactant and water wherein the composition has good feel and acceptable viscosity. The expression comprising of the claims' language does not exclude the presence of other ingredients, active or inactive, even in major amounts such as saccharides or amino acids taught by Puchalaski.

Applicants argue that Puchalaski teaches PEG-7-glyceryl cocoate, as well as hexylene glycol, propylene glycol, or sorbital, and sodium pyrrolidonecarboxylic acid as optional humectants and/or emollients.

In response to this argument, it is argued that in considering the disclosure of the reference, it is proper to take into account not only the specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom. *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968). The rational to modify or to combine the prior art does not have to be expressly stated in the prior art; the rational may be expressly or impliedly contained in the prior art or it may be reasoned from knowledge generally available to one of

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ordinary skill in the art. The reason or motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve different problem. It is not necessary that the prior art suggest the combination or modification to achieve the same advantage or result discovered by applicant. *In re Linter*, 458 F.2d 1013, 173 USPQ 560 (CCPA 1972). The disclosed examples and preferred embodiment do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971).

Applicants argue that even if there was an incentive in Robinson which would make it obvious to one skilled in the art to select a components from Puchalaski to serve as a humectant or emollient, there is no justifiable bases for one of ordinary skill in the art to conclude that this combination would provide a method to deter the buildup of sebum on the surface of the hair. Rather, the only motivation for such a conclusion has been provided by applicants' claimed invention which the Examiner has used as a template with unjustified hindsight to construct a composition, and not applicants' claimed method for deterring the buildup of sebum on the surface of the hair.

In response to this argument, it is argued that the present claimed method is achieved by conditioning effect, as applicants admit as set forth in this office action, and the combination of the references teaches conditioning effect which is achieved by composition comprising the same elements of the present composition in the same concentration, therefore, hair conditioning is achieved by deterring from build up sebum obtained by applying the composition of combination of the references. If the prior art

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meets the structure recited, the properties must be met or Applicant's claim is incomplete. This is in line with *In re Spada*, 15 USPQ 2d 1655 (1990) which holds that products of identical chemical composition can not have mutually exclusive properties. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

The present invention as a whole is taught by the combination of the references. A conclusion of obviousness under 35 U.S.C. 103 (a) does not require absolute predictability, only a reasonable expectation of success; and references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosure. *In re Bozek*, 163 USPQ 545 (CCPA 1969).

In the light of the foregoing discussion, the Examiner's ultimate legal conclusion is that the subject matter as a whole as defined by the claims would have been prima facie obvious within the meaning of 35 U.S.C. 103 (a).

6. Claims 15, 16, 19-24, 30, 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robinson et al. (US 2003/0049212) in view of the article by Garruto (Specialty Esters for Aqueous Systems).

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Robinson teaches skin composition comprising 0.1-30% silicone elastomer, 0.5-10% emulsifier, surfactant, and 1-95% water (abstract; paragraph 0075, 0133, 0137; claim 1, 12, 14). The composition useful for cleansing can be formulated as rinse off cleansing such as shampoos, or can be hair conditioners (paragraph 0213).

Advantageously, the silicone elastomer is dimethicone/vinyl dimethicone crosspolymers (paragraph 0089; claim 11). The emulsifier preferably has HLB value of 2 to 14 (paragraph 0159). The emulsifier can be polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids and sucrose fatty acid esters (paragraphs 0168, 0192). The surfactant is cationic, anionic, zwitterionic or amphoteric surfactant, and present in amount of 5-10% (paragraphs 0169, 0193, 0212).

Although Robinson teaches polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids, however, the reference does not explicitly teach PEG/PPG-8/3laurate or polyglycerol-3-laurate as instantly claimed by claim 24, 30 and 31.

Garruto teaches fatty acid esters suitable for hair and skin compositions and include polyglycerol-3-laurate and PEG/PPG-8/3 laurate that have super moisturizing and emollient properties and compatible with aqueous system (see the provided article).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide shampoo comprising dimethicone/vinyl dimethicone crosspolymers, emulsifier including polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids, surfactant and water as taught by Robinson, and utilize the fatty acid ester polyglycerol-3-laurate and PEG/PPG-8/3 laurate taught by Garruto. One would have been motivated to do so because Garruto teaches that polyglycerol-3-laurate and PEG/PPG-8/3 laurate

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provide moisturizing and emollient properties to shampoo and skin care compositions. One would reasonably expected formulating cleansing composition such as shampoo comprising dimethicone/vinyl dimethicone crosspolymers, polyglycerol-3-laurate and/or PEG/PPG-8/3 laurate, surfactant and water wherein the composition has moisturizing and emollient effect.

### ***Response to Arguments***

7. Applicant's arguments filed 09/09/2009 have been fully considered but they are not persuasive.

Applicants repeat the argument against Robinson as discussed above. Therefore, the examiner hereby repeats the response as set forth in this office action. Robinson in combination with the secondary references teach rinse of conditioning composition comprising every element of the claimed composition.

Applicants argue that the deficiencies of Robinson are not remedied by its combination with Garruto. Garruto discloses esters for use as emollients and moisturizings, such as PEG-8/PPG-3 diisostearate, PEG-90 diisostearate, polyglycerol-3 laurate, and PEG-8/PPG-3 laurate. Garruto does not disclose these substances in method for treating hair to deter the buildup of sebum on the surface of the hair.

In response to this argument, it is argued that Robinson teaches conditioning of hair that implies deterring of sebum buildup on the surface of hair, as previously discussed in this office action. Garruto is relied upon for the solely teaching of specific

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species of fatty acid esters that is suitable for hair and skin compositions and include polyglycerol-3-laurate and PEG/PPG-8/3 laurate that have super moisturizing and emollient properties and compatible with aqueous system. This teaching would have motivated one having ordinary skill in the art to utilize the fatty acid ester polyglycerol-3-laurate and PEG/PPG-8/3 laurate to replace polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids emulsifier of Robinson. One would reasonably expected formulating cleansing composition such as shampoo for hair conditioning comprising dimethicone/vinyl dimethicone crosspolymers, polyglycerol-3-laurate and/or PEG/PPG-8/3 laurate, surfactant and water wherein the composition has moisturizing and emollient effect.

The present invention as a whole is taught by the combination of the references. A conclusion of obviousness under 35 U.S.C. 103 (a) does not require absolute predictability, only a reasonable expectation of success; and references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosure. *In re Bozek*, 163 USPQ 545 (CCPA 1969).

In the light of the foregoing discussion, the Examiner's ultimate legal conclusion is that the subject matter as a whole as defined by the claims would have been prima facie obvious within the meaning of 35 U.S.C. 103 (a).

8. Claims 15, 16, 19-24, 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robinson et al. (US 2003/0049212) in view of Mercier et al. (US 7,488,471).

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Robinson teaches skin composition comprising 0.1-30% silicone elastomer, 0.5-10% emulsifier, surfactant, and 1-95% water (abstract; paragraph 0075, 0133, 0137; claim 1, 12, 14). The composition useful for cleansing can be formulated as rinse off cleansing such as shampoos, or can be hair conditioners (paragraph 0213).

Advantageously, the silicone elastomer is dimethicone/vinyl dimethicone crosspolymers (paragraph 0089; claim 11). The emulsifier preferably has HLB value of 2 to 14 (paragraph 0159). The emulsifier can be polyglyceryl ester of C<sub>1</sub>-C<sub>30</sub> fatty acids and sucrose fatty acid esters (paragraphs 0168, 0192). The surfactant is cationic, anionic, zwitterionic or amphoteric surfactant, and present in amount of 5-10% (paragraphs 0169, 0193, 0212).

Although Robinson teaches sucrose fatty acid esters, however, the reference does not explicitly teach sucrose laurate as instantly claimed by claim 24, and 32.

Mercier teaches cosmetic composition containing emulsifying fatty acid esters having HLB from 11-16 including sucrose laurate (abstract; example 2; claim 1). Such emulsifier is exceptionally mild and less irritating to the skin and eyes and surprisingly has skin moisturizing effect (col.2, line 62 till col.3, line 5). Emulsifiers are utilized in hair conditioners and gels (col.4, lines 62-66).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide shampoo comprising dimethicone/vinyl dimethicone crosspolymers, emulsifier including sucrose fatty acid esters, surfactant and water as taught by Robinson, and utilize sucrose laurate taught by Mercier. One would have been motivated to do so because Mercier teaches that sucrose laurate is

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exceptionally mild and less irritating to the skin and eyes and surprisingly has skin moisturizing effect. One would reasonably expected formulating cleansing composition such as shampoo comprising dimethicone/vinyl dimethicone crosspolymers, sucrose laurate, surfactant and water wherein the composition is mild, non-irritating to skin and eye and further has moisturizing effect on the skin.

### ***Response to Arguments***

9. Applicant's arguments filed 09/09/2009 have been fully considered but they are not persuasive.

Applicants argue that the combination of Robinson with Mercier does not resolve the deficiencies of Robinson. Mercier relates to a transparent or clear oil-in-water emulsion comprising an oil phase containing at least one lipophilic solvent; an aqueous phase; and an emulsifying system containing at least one non-ethoxylated fatty acid ester having HILB from about 11 to 16. Mercier discloses a wide range of cosmetic and pharmaceutical applications such as deodorants, skin and moisturizing gels, conditioner and glosser gels, sunscreen agents, skin tightening gels and pharmaceutically active ingredients. There is no disclosure in Mercier in use the transparent oil-in-water emulsion composition in a method for reducing the buildup of sebum on the surface of the hair, using the unique combination of components.

In response to this argument, it is argued that Robinson teaches conditioning of hair that implies deterring of sebum buildup on the surface of hair, as previously discussed in this office action. Mercier is relied upon for the solely teaching of specific

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emulsifying fatty acid esters having HLB from 11-16 including sucrose laurate. Such emulsifier is exceptionally mild and less irritating to the skin and eyes and surprisingly has skin moisturizing effect. Emulsifiers are utilized in hair conditioners and gels. This teaching would have motivated one having ordinary skill in the art to utilize sucrose laurate having HLB from 11-16 to replace the emulsifier of Robinson. One would reasonably expected formulating cleansing composition such as shampoo comprising dimethicone/vinyl dimethicone crosspolymers, sucrose laurate, surfactant and water wherein the composition is mild, non-irritating to skin and eye and further has moisturizing effect on the skin.

The present invention as a whole is taught by the combination of the references. A conclusion of obviousness under 35 U.S.C. 103 (a) does not require absolute predictability, only a reasonable expectation of success; and references are evaluated by what they suggest to one versed in the art, rather than by their specific disclosure. *In re Bozek*, 163 USPQ 545 (CCPA 1969).

In the light of the foregoing discussion, the Examiner's ultimate legal conclusion is that the subject matter as a whole as defined by the claims would have been prima facie obvious within the meaning of 35 U.S.C. 103 (a).

### ***Conclusion***

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

#### ***Contact Information***

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Isis A. Ghali whose telephone number is (571) 272-0595. The examiner can normally be reached on Monday-Thursday, 6:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila Landau can be reached on (571) 272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

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/Isis A Ghali/  
Primary Examiner, Art Unit 1611

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